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## *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*

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# The Judgment Enforceability Factor in Forum Non Conveniens Analysis

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*ABSTRACT: The forum non conveniens doctrine gives courts the discretion to dismiss a lawsuit on the ground that a court in a foreign country is more appropriate and convenient for adjudicating the parties' dispute, and the Supreme Court has provided a list of private and public interest factors to guide this discretion. One of the private interest factors, however, remains poorly understood: the enforceability of a judgment if one is obtained. As a result, the judgment enforceability factor is often neglected by judges and lawyers. When it is applied, it tends to be applied inconsistently or in a conclusory manner.*

*This Article explains the proper role of the judgment enforceability factor in forum non conveniens analysis, and provides a simple framework to guide its application by judges and lawyers. Part II explains the context of the Article's analysis by providing a brief overview of the forum non conveniens doctrine and how the enforceability factor fits into it. Part III argues that the judgment enforceability factor is important not only doctrinally, but also for justice and efficiency. Part IV identifies the problem: Notwithstanding the judgment enforceability factor's importance, it is often neglected; when it is not neglected, it tends to be applied inconsistently; and even when the factor is properly interpreted, it is often applied in a conclusory manner. Part V offers a solution to this problem by drawing on the best practices of judges, the law of foreign judgments, and the realities of transnational litigation to develop a framework for the proper application of the enforceability factor. By taking the judgment enforceability factor seriously, judges can help ensure that the forum non conveniens doctrine will effectively advance the goals of justice and efficiency.*

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## I. INTRODUCTION

The forum non conveniens doctrine gives U.S. courts the discretion to dismiss a lawsuit on the ground that a court in a foreign country is more appropriate and convenient for adjudicating the parties' dispute.<sup>1</sup> The doctrine plays an important role in U.S. litigation today.<sup>2</sup> In a globalized world, legal disputes are often transnational—that is, they often involve both U.S. and foreign parties or arise out of activity that occurred partly in the United States and partly in foreign territory.<sup>3</sup> The U.S. connections mean that a plaintiff preferring a U.S. court may be able to establish personal jurisdiction over the defendant there;<sup>4</sup> but the foreign connections mean that the defendant may be able to defeat the plaintiff's choice of forum by filing a motion to dismiss the suit in favor of a foreign court based on the forum non conveniens doctrine.<sup>5</sup> In transnational suits, defendants frequently file motions to dismiss on forum non conveniens grounds, plaintiffs oppose them, and judges face the task of deciding whether to grant them.

1. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007) (stating that under the forum non conveniens doctrine, "a federal district court may dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy").

2. Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 341 (2004) ("[T]he doctrine of *forum non conveniens* occupies a central role in international litigation.").

3. See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 506–16 (2011) (presenting data on the amount of transnational litigation in the U.S. district courts).

4. This is becoming more difficult for plaintiffs. The U.S. Supreme Court's recent decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, *J. McIntyre Machinery, Ltd. v. Nicastro*, and *Daimler AG v. Bauman* all appear to limit the scope of personal jurisdiction over defendants in transnational suits. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014) (holding that a German corporation that is headquartered and manufactures vehicles in Germany "is not 'at home' in California, and cannot be sued there for injuries plaintiffs attribute to [its Argentinean subsidiary]'s conduct in Argentina"); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (holding that where the only connection to North Carolina is that tires made by Goodyear's foreign subsidiaries entered "North Carolina through 'the stream of commerce' . . . [the] connection does not establish the 'continuous and systematic' affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State"); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (holding that a British scrap metal machine manufacturer was not subject to jurisdiction in New Jersey because the plaintiff failed to show the British company "engaged in conduct purposefully directed at New Jersey").

5. Importantly, forum non conveniens dismissals are not "transfers"—U.S. courts and foreign courts are parts of different legal systems, and a court in one does not have the authority to compel a court in another to accept a suit. See David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 370 (1994) ("[A] court in New York cannot transfer a case to a court in India. It can only dismiss, impose conditions, and wish the plaintiffs 'Godspeed.'"). Thus, a suit dismissed from a U.S. court on forum non conveniens grounds will only continue in a foreign court if the plaintiff refiles the suit there and the foreign court asserts jurisdiction over it. Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1453 n.31 (2011).

To guide judges' discretion, the Supreme Court provided a list of private and public interest factors to consider when deciding *forum non conveniens* motions.<sup>6</sup> One of the private interest factors is "the enforceability [sic] of a judgment if one is obtained."<sup>7</sup> When a U.S. court grants a defendant's motion to dismiss on *forum non conveniens* grounds, it denies the plaintiff court access in the United States based on the assumption that the plaintiff will be able to pursue its claim in the defendant's proposed foreign court.<sup>8</sup> However, if the plaintiff would be unable to enforce a judgment entered by the foreign court, the possibility of obtaining a meaningful remedy there would be illusory. The result can be an access-to-justice gap: A plaintiff may be denied both court access in the United States and a remedy based on the foreign court's judgment.<sup>9</sup> Because litigation in a foreign court that cannot produce an enforceable remedy is wasteful, the result is also inefficient.<sup>10</sup> The judgment enforceability factor in *forum non conveniens* analysis draws attention to these fairness and efficiency considerations and, if properly applied, can ensure that they are taken into account before a judge decides to grant a motion to dismiss.<sup>11</sup>

However, the judgment enforceability factor is often neglected.<sup>12</sup> Moreover, when it is applied, it tends to be applied inconsistently or in a conclusory manner.<sup>13</sup> To address these problems, and to improve the fairness and efficiency of *forum non conveniens* decisions, this Article explains the proper role of the judgment enforceability factor in *forum non conveniens* analysis and provides a simple framework to guide its application by judges and lawyers.

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6. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

7. *Id.* at 508.

8. *See* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum."); *see also* 14D CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3828, at 573 (4th ed. 2013) ("[F]orum non conveniens is proper only when an adequate alternative forum is available.").

9. Whytock & Robertson, *supra* note 5, at 1472–81 (explaining and documenting the transnational access-to-justice gap).

10. *See id.* at 1488–89 (critiquing the access-to-justice gap).

11. *See infra* Part III. This Article builds on others that have noted the importance of the judgment enforceability factor. *See, e.g.*, M. Ryan Casey & Barrett Ristorph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?*, 4 *BYU INT'L L. & MGMT. REV.* 21, 41–43 (2007); Kathleen Crowe, *Cleaning Up the Mess: Forum Non Conveniens and Civil Liability for Large-Scale Transnational Environmental Disasters*, 24 *GEO. INT'L ENVTL. L. REV.* 449, 475 (2012); Whytock & Robertson, *supra* note 5, at 1496–98.

12. *See infra* Part IV.A.

13. *See* Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 *TUL. L. REV.* 309, 348 (2002) (noting that "[t]he *Gilbert* court did not articulate what kind of 'enforceability' question it had in mind" and observing that "[n]ot surprisingly, different courts have used this sentence as authority for considering rather different features of the cases before them").

The Article proceeds as follows. In Part II, we provide context with a brief overview of the forum non conveniens doctrine and how the judgment enforceability factor fits into it. In Part III, we argue that the judgment enforceability factor is important not only doctrinally, but also for justice and efficiency. In Part IV, we identify the problem: Notwithstanding the judgment enforceability factor's importance, it is often neglected; when it is not neglected, it tends to be applied inconsistently; and even when the factor is properly interpreted, it is often applied in a conclusory manner. In Part V, we offer a solution to this problem by drawing on the best practices of judges, the law of foreign judgments, and the realities of transnational litigation, to develop a framework for the proper application of the enforceability factor in forum non conveniens analysis. By taking the judgment enforceability factor seriously, judges can help ensure that the forum non conveniens doctrine will effectively advance the goals of justice and efficiency.

## II. THE FORUM NON CONVENIENS DOCTRINE

Under the forum non conveniens doctrine, “a federal district court may dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy.”<sup>14</sup> The doctrine has three main elements. The first element requires a court to determine whether the defendant’s proposed foreign court is an available and adequate alternative forum. Unless it is, a forum non conveniens dismissal is not permitted.<sup>15</sup> A foreign court is ordinarily deemed *available* if the defendant is subject to jurisdiction there.<sup>16</sup> A foreign court is generally deemed *adequate*

14. *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007). We focus here on the federal forum non conveniens doctrine. There are also state forum non conveniens doctrines applied by state courts. Although there are significant differences between state and federal doctrines and among state doctrines, the states’ approaches to the forum non conveniens doctrine generally follow the federal approach. *See* Davies, *supra* note 13, at 315 (“Thirty states, the District of Columbia, and all U.S. territories engage in an analysis effectively identical to that undertaken in federal courts, and thirteen other states employ a factor-based analysis very similar to [the one] used [by the Supreme Court].”). Even in a state that has not explicitly incorporated the judgment enforceability factor, that factor should be considered for the reasons of justice and efficiency that we present below. *See infra* Part III.

15. *See* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (“At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum.”); *see also* 14D WRIGHT ET AL., *supra* note 8, § 3828.3, at 629 (“A motion to dismiss for forum non conveniens will not be granted unless there is an alternative forum in which the action can be brought.”); Davies, *supra* note 13, at 314 (“The first step in any forum non conveniens analysis . . . is a determination of whether an adequate alternative forum exists to hear the dispute in another country. If there is no adequate alternative forum, the question of dismissal should proceed no further.”).

16. *See* *Piper*, 454 U.S. at 254 n.22 (“Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction.” (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947))); *see also* *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011) (“An alternative forum is ‘available’ to the plaintiff when the foreign court can assert jurisdiction over the litigation sought to be transferred.” (quoting *Leon v. Millon Air, Inc.*, 251

for forum non conveniens purposes unless the potential remedy it offers “is so clearly inadequate . . . that it is no remedy at all,” such as “where the alternative forum does not permit litigation of the subject matter of the dispute”<sup>17</sup>—although some scholars have argued for, and some courts have applied, a more rigorous foreign judicial adequacy standard.<sup>18</sup>

The doctrine’s second element requires a court to analyze private and public interest factors to determine whether they point toward dismissal in favor of the defendant’s proposed foreign court.<sup>19</sup> The Supreme Court has described the private interest factors as follows:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability [sic] of a judgment if one is obtained.<sup>20</sup>

The Supreme Court has described the public interest factors as follows:

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F.3d 1305, 1311 (11th Cir. 2001)); 14D WRIGHT ET AL., *supra* note 8, § 3828.3, at 639 (“[A]n alternative forum generally is deemed available if the case and all of the parties come within that alternative court’s jurisdiction.”). Defendants often satisfy this requirement by consenting to the jurisdiction of the alternative forum. *See* 14D WRIGHT ET AL., *supra* note 8, § 3828.3, at 639 (“Courts often allow a defendant to satisfy the availability requirement by stipulating that it will submit to personal jurisdiction in the alternative forum as a condition for the dismissal on forum non conveniens grounds. Similarly, the dismissal may be conditioned on the acceptance of the case by the alternative forum.”).

17. *Piper*, 454 U.S. at 254 & n.22. The Supreme Court noted the example of a “court refus[ing] to dismiss, where alternative forum is Ecuador, it is unclear whether Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted.” *Id.* at 254–55 n.22 (citing *Phx. Can. Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 456 (D. Del. 1978)). A foreign court may be deemed adequate and dismissal may be granted even if the law that the foreign court would apply is less favorable to the plaintiff than the law that a U.S. court would apply. *See id.* at 250 (“[D]ismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff’s chance of recovery.”).

18. Whytock & Robertson, *supra* note 5, at 1456–60.

19. *See* 14D WRIGHT ET AL., *supra* note 8, § 3828.4, at 673 (“If the alternative forum is found to be both available and adequate, the defendant next must show that the balance between the private interests and public interests described by the Supreme Court . . . weighs in favor of dismissal.”).

20. *Gilbert*, 330 U.S. at 508; *see also* *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994) (listing the same private interest factors, including enforceability of judgments). At least one commentator has argued that *Gilbert*’s phrase “[t]here may also be questions” means that “[a]s a purely textual matter, . . . although difficulty of enforcing a judgment may be taken into account in considering forum non conveniens dismissal, it is not as important as the other private interest factors.” Davies, *supra* note 13, at 348. This likely attributes too much significance to this wording. Moreover, as we show in Part III, the factor is important for reasons of justice and efficiency—and perhaps more fundamentally important than factors that merely relate to convenience.

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.<sup>21</sup>

Third, in order to assess whether the private and public factors point strongly enough toward the foreign court to justify dismissal, the court must determine what degree of deference it owes to the plaintiff's choice of a U.S. court. This depends on whether the plaintiff is a U.S. or foreign citizen. According to the Supreme Court, "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum."<sup>22</sup> However, the Supreme Court also held this presumption applies with less force to foreign plaintiffs.<sup>23</sup>

### III. THE IMPORTANCE OF THE JUDGMENT ENFORCEABILITY FACTOR

The judgment enforceability factor is an important part of forum non conveniens analysis. As noted in Part II, the judgment enforceability factor is important doctrinally because it is among the private interest factors specified by the Supreme Court. As this Part explains, the judgment enforceability factor is also important for justice and efficiency.

#### A. JUSTICE

Although the forum non conveniens doctrine is concerned with convenience, its overarching (if sometimes underappreciated) purpose is to promote the ends of justice.<sup>24</sup> It is therefore important to remember that the

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21. *Gilbert*, 330 U.S. at 508–09; *see also Am. Dredging Co.*, 510 U.S. at 448–49 (listing the same public interest factors).

22. *Piper*, 454 U.S. at 255; *see also Gilbert*, 330 U.S. at 508 (“[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.”).

23. *Piper*, 454 U.S. at 255–56 (“When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.”).

24. *See Whytock & Robertson*, *supra* note 5, at 1455 (arguing that the forum non conveniens “doctrine's overarching purpose is best understood as being to promote the ends of justice”); *see also Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 528 (1947)



forum non conveniens doctrine is a court access doctrine: A forum non conveniens dismissal is a decision to deny a plaintiff access to a U.S. court, even if the court has personal jurisdiction and subject matter jurisdiction.<sup>25</sup>

The doctrine's available and adequate alternative forum requirement helps ensure that a U.S. court will not dismiss a suit on forum non conveniens grounds if the plaintiff would not have court access in the defendant's preferred foreign jurisdiction.<sup>26</sup> But even if the defendant's proposed foreign court is available and adequate for forum non conveniens purposes, a dismissal may have the effect of denying the plaintiff meaningful access to justice if the plaintiff would be unable to enforce a judgment entered by the foreign court. For example, if the defendant has assets in the foreign jurisdiction, the foreign court may order that those assets be seized and sold and that the proceeds be given to the plaintiff in satisfaction of the judgment. If the defendant lacks assets in the foreign jurisdiction, however, the plaintiff will need to seek enforcement in a jurisdiction where the defendant does have

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(explaining that the forum non conveniens doctrine “looks to the realities that make for doing justice”); *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 554 (1946) (stating that the forum non conveniens doctrine “was designed as an ‘instrument of justice’” (quoting *Rogers v. Guar. Tr. Co.*, 288 U.S. 123, 151 (1933) (Cardozo, J., dissenting))); *Rogers*, 288 U.S. at 151 (Cardozo, J., dissenting) (“The doctrine of forum non conveniens is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers, when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused.”); *Can. Malting Co. v. Patterson S.S., Ltd.*, 285 U.S. 413, 423 (1932) (characterizing the forum non conveniens doctrine as allowing courts to “occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal”); *Guidi v. Inter-Cont'l Hotels Corp.*, 224 F.3d 142, 147 (2d Cir. 2000) (“For the purposes of *forum non conveniens*, . . . ‘the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice.’” (quoting *Koster*, 330 U.S. at 527)); Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 404 (1947) (suggesting that under the forum non conveniens doctrine, courts should search “for that forum in which the ends of justice will best be served”). This understanding of the doctrine is also reflected in *Gutierrez v. Advanced Medical Optics, Inc.*, in which the Ninth Circuit Court of Appeals vacated the district court's order dismissing a suit on forum non conveniens grounds because the alternative forum had declined to accept jurisdiction, rendering it unavailable. *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1027 (9th Cir. 2011). The court of appeals noted that “[a]t its core, the doctrine of *forum non conveniens* is concerned with fairness to the parties,” and emphasized “the judicial objective ‘that every right, when withheld, must have a remedy, and every injury its proper redress.’” *Id.* at 1030 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). It reasoned that “to simply affirm the district court without acknowledging that Plaintiffs do not have a forum in which to bring their case would, apparently, be to leave their . . . injuries wholly unredressed.” *Id.*

25. See generally Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 781–82, 794 (1985) (arguing that the forum non conveniens doctrine, like the doctrines of personal jurisdiction and subject matter jurisdiction, are court access doctrines). In fact, a court may dismiss a suit on forum non conveniens grounds even without determining whether it has jurisdiction. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (holding that “a court need not resolve whether it has . . . subject-matter jurisdiction[] or personal jurisdiction” before dismissing on forum non conveniens grounds).

26. See *supra* Part II.

assets. Defendants in transnational suits with connections to the United States will often have assets in U.S. territory. This is especially likely for U.S. defendants. Yet a foreign court cannot enforce its judgments in U.S. territory. Therefore, a plaintiff in this situation will need to return to the United States (where it originally filed its suit) to ask a U.S. court to enforce the judgment of the foreign court (the same foreign court in favor of which a U.S. court previously dismissed the suit on *forum non conveniens* grounds).

But U.S. courts may be unable or unwilling to oblige. The full-faith-and-credit obligations that U.S. states owe each other do not extend to foreign countries.<sup>27</sup> Instead, a distinct body of U.S. law governs the recognition and enforcement of foreign country judgments. The law of foreign country judgments—discussed in more detail in Part V—provides that a U.S. court should ordinarily grant enforcement. There are, however, numerous grounds for refusing enforcement, some of which are mandatory (requiring non-enforcement) and some of which are discretionary (allowing, but not requiring, non-enforcement). For example, in most states, a court is prohibited from enforcing a judgment entered by a court in a foreign country with “a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”<sup>28</sup> Thus, the *forum non conveniens* doctrine and the law of foreign country judgments can combine to deny a plaintiff meaningful access to justice: The plaintiff may be both denied court access in the United States under the *forum non conveniens* doctrine and denied a remedy based on the foreign court’s judgment under the law of foreign country judgments.<sup>29</sup> In most situations, such an outcome would contradict the doctrine’s underlying policy of promoting the ends of justice.<sup>30</sup>

27. See Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT L. REV. 491, 496 (2013) (“Unlike a judgment from state or federal courts in the United States, judgments from foreign courts do not receive either the benefit of the Full Faith and Credit Clause in Article IV of the U.S. Constitution or the analogous federal statute found at 28 U.S.C. § 1738.”).

28. See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(1), 13 pt. 2 U.L.A. 28 (Supp. 2015); see also *infra* notes 86–91 and accompanying text (discussing the number of states that have implemented the Uniform Foreign Money-Judgments Recognition Act (“UFMJRA”) and the Uniform Foreign-Country Money Judgments Recognition Act (“UFCMJRA”), and the mandatory grounds for refusing enforcement in both Acts).

29. See Whytock & Robertson, *supra* note 5, at 1472–81 (explaining and documenting the transnational access-to-justice gap).

30. See *supra* note 24 and accompanying text. If a plaintiff engages in wrongdoing in the foreign proceedings (such as fraud) and that wrongdoing is the basis for a U.S. court’s refusal of enforcement, then refusing enforcement would ordinarily promote the ends of justice. See Whytock & Robertson, *supra* note 5, at 1473 n.133 (“Whereas denial of access to justice when a *forum non conveniens* dismissal is combined with a refusal to enforce a foreign judgment on public policy or reciprocity grounds raises serious concerns, this generally would not seem to be the case when the refusal to enforce is based on fraud committed by plaintiffs themselves.”). However, the foreign court itself, or an appellate court in the foreign country, would seem better situated than a U.S. court to decide issues arising out of a plaintiff’s conduct in the foreign

The judgment enforceability factor is an important part of forum non conveniens analysis because it can help judges avoid this type of outcome. Judges already know that granting a forum non conveniens motion means denying a plaintiff U.S. court access. By considering at the forum non conveniens stage—*before* a decision to dismiss—whether a judgment entered by the defendant’s proposed foreign court would be enforceable, judges can reduce the likelihood of dismissals when it appears that U.S. law would also prevent the plaintiff from obtaining an enforceable judgment from the defendant’s proposed foreign court.

*B. EFFICIENCY*

Another value underlying the forum non conveniens doctrine is efficiency.<sup>31</sup> The judgment enforceability factor promotes this value, too. In some cases, private interest factors such as “the cost of obtaining attendance of . . . witnesses” and practical considerations “that make trial of a case easy, expeditious and inexpensive,” and public interest factors such as the “[a]dministrative difficulties . . . for courts when litigation is piled up in congested centers” and the need for a court to devote resources to “untangle problems in conflict of laws, and in law foreign to itself,”<sup>32</sup> may—taken in isolation—suggest that litigating the dispute in the defendant’s proposed foreign court would be more efficient.

But if a judgment rendered by the foreign court would not be enforceable, then dismissal would be inefficient notwithstanding those factors because the foreign litigation would waste the resources of the parties and the foreign country.<sup>33</sup> Even when it is unclear whether a judgment of the foreign court would be enforceable, a forum non conveniens dismissal may ultimately bring back to the United States the same “administrative difficulties” and burdens of untangling problems of conflict of laws and foreign law that the doctrine seeks to avoid, if the parties return once again to the United States to litigate the enforceability of the foreign judgment.<sup>34</sup> Such so-called “boomerang litigation” can ultimately lead to the sort of inefficiencies that the forum non conveniens doctrine seeks to avoid.<sup>35</sup>

Simply put, it is inefficient to dismiss a suit in favor of a foreign court if the foreign court will be unable to produce an enforceable judgment, and it

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proceedings. See Christopher A. Whytock, *Some Cautionary Notes on the “Chevronization” of Transnational Litigation*, 1 STAN. J. COMPLEX LITIG. 467, 477–79 (2013).

31. See *Mercier v. Sheraton Int’l, Inc.*, 935 F.2d 419, 429 (1st Cir. 1991) (noting “the norms of increased convenience and efficiency underlying the forum non conveniens doctrine”).

32. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947); see also *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448–49 (1994) (listing the same public interest factors).

33. See Whytock & Robertson, *supra* note 5, at 1488–89.

34. *Gilbert*, 330 U.S. at 508–09; see also Whytock & Robertson, *supra* note 5, at 1483–84 (discussing these costs).

35. See *Casey & Ristorph*, *supra* note 11, at 21–22.

may also be inefficient if, after litigation in the foreign court, the question of enforceability is litigated in a U.S. court.<sup>36</sup> In either case, the judgment enforceability factor would weigh against dismissal, working together with other private and public interest factors to reduce the likelihood of inefficient forum non conveniens dismissals.

#### IV. THE ENFORCEABILITY FACTOR IN PRACTICE

In both *Gulf Oil Corp. v. Gilbert* and *American Dredging Co. v. Miller*, the Supreme Court included the judgment enforceability factor in its statement of the forum non conveniens doctrine.<sup>37</sup> Moreover, as described above, the judgment enforceability factor is important for both justice and efficiency. But as this Part shows, the factor is often neglected; when it is not neglected, it tends to be applied inconsistently; and even when the factor is properly interpreted, it is often applied in a conclusory manner.

##### A. NEGLECT

Some courts have neglected the Supreme Court's judgment enforceability factor altogether. This includes, in one instance, the Supreme Court itself. In *Piper Aircraft Co. v. Reyno*, the Court cited *Gulf Oil Co. v. Gilbert* but did not include the judgment enforceability factor in its list of private and public interest factors, and did not apply the factor in its analysis,<sup>38</sup> although it did include the judgment enforceability factor in its *American Dredging* decision 13 years later.<sup>39</sup> In addition, several trial and appellate courts have quoted *Piper's* list of private and public interest factors, and consequently omitted the judgment enforceability factor.<sup>40</sup> Other courts cite the private interest factor language directly from *Gilbert*, but leave out the line about the judgment enforceability factor.<sup>41</sup>

Still other courts acknowledge that the judgment enforceability factor is part of the forum non conveniens doctrine, but then fail to analyze the

36. See Whytock & Robertson, *supra* note 5, at 1488–89.

37. See *Am. Dredging Co.*, 510 U.S. at 448; *Gilbert*, 330 U.S. at 508–09.

38. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

39. See *Am. Dredging Co.*, 510 U.S. at 448.

40. See, e.g., *Innovation First Int'l, Inc. v. Zuru, Inc.*, 513 F. App'x 386, 390–91 (5th Cir. 2013); *Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 249 (4th Cir. 2011); *Alfadda v. Fenn*, 159 F.3d 41, 46 (2d Cir. 1998); *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998); *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 831 (5th Cir. 1986); *In re BP S'holder Derivative Litig.*, No. 4:10-CV-3447, 2011 WL 4345209, at \*3 (S.D. Tex. Sept. 15, 2011); *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 306 (S.D.N.Y. 2000).

41. See, e.g., *Delta Air Lines, Inc. v. Chimet, S.p.A.*, 619 F.3d 288, 296 (3d Cir. 2010); *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 189 (3d Cir. 2008); *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73–74 (2d Cir. 2001); *Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 703–04 (9th Cir. 1995); *Pereira v. Utah Transp., Inc.*, 764 F.2d 686, 690 (9th Cir. 1985).

factor.<sup>42</sup> This was the case in the Third Circuit's opinion in the *Piper* litigation.<sup>43</sup> Whether failing to analyze the judgment enforceability factor or neglecting it altogether, the result is that the deciding court fails to address the possible relevance of an eventual judgment's enforceability.

#### B. INCONSISTENT INTERPRETATION

Even where courts have addressed the enforceability factor, they have interpreted it in different ways.<sup>44</sup> According to one interpretation, the factor instructs courts to consider the enforceability of a judgment that may eventually be entered by the defendant's proposed foreign court; to the extent there would be problems enforcing such a judgment, the factor weighs against dismissal.<sup>45</sup> One example of this interpretation is *Carijano v. Occidental Petroleum Corp.*<sup>46</sup> The claims in *Carijano* arose out of Occidental Petroleum's operations in Peru that began in the early 1970s when it discovered oil in a remote region.<sup>47</sup> An indigenous group in the area, the Achuar, filed a complaint in 2007 claiming that during the time of Occidental's operations in the region, its "out-of-date methods for separating crude oil" resulted in the release "of millions of gallons of toxic oil byproducts into the area's waterways,"<sup>48</sup> which the plaintiffs claimed led to health issues such as "gastrointestinal problems, kidney trouble, skin rashes, and aches and pains," and negatively impacted their food supply.<sup>49</sup>

The defendant moved to dismiss the suit on forum non conveniens grounds in favor of the courts of Peru.<sup>50</sup> The district court held that Peru was an adequate alternative forum, and granted the defendant's motion to dismiss after finding that the private and public interest factors weighed in favor of

42. See, e.g., *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1381, 1382–84 (11th Cir. 2009); *Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1356–57 (11th Cir. 2008); *Ford v. Brown*, 319 F.3d 1302, 1307–09 (11th Cir. 2003); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145–47 (9th Cir. 2001); *Murray v. British Broad. Corp.*, 81 F.3d 287, 294 (2d Cir. 1996); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 424, 427–28 (1st Cir. 1991).

43. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 160–63 (3d Cir. 1980).

44. See Davies, *supra* note 13, at 348–51 (analyzing lower courts' varying approaches).

45. *Id.* at 348–49; see, e.g., *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1231–32 (9th Cir. 2011); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 836 (5th Cir. 1993) ("On the other hand, the district court found some factors in favor of retaining jurisdiction, including . . . potential difficulties regarding enforcement of any judgment that might be rendered by a German court."); *King.com Ltd. v. 6 Waves LLC*, No. C-13-3977MMC, 2014 WL 1340574, at \*7–8 (N.D. Cal. Mar. 31, 2014) (noting that at least one U.S. court has enforced a money judgment of a Chinese court, but nevertheless finding in a copyright infringement case that the judgment enforceability factor weighed against dismissal in favor of a Chinese court where there was no evidence that a U.S. court would enforce an injunction issued by a Chinese court).

46. *Carijano*, 643 F.3d at 1216.

47. *Id.* at 1222.

48. *Id.*

49. *Id.* at 1223.

50. *Id.*

dismissal.<sup>51</sup> The Ninth Circuit Court of Appeals reversed because, among other things, the district court failed to consider the judgment enforceability factor.<sup>52</sup>

In *Carijano*, the Ninth Circuit noted that the district court's failure to consider the enforceability of a Peruvian court judgment was the "[m]ost critica[l]" reason for reversal.<sup>53</sup> First, "the district court failed to give any consideration to whether a judgment against Occidental could be enforced in Peru."<sup>54</sup> The Court of Appeals noted that Occidental withdrew its Peruvian operations, "rais[ing] questions about what assets might be available in Peru to satisfy a judgment there."<sup>55</sup> The Court of Appeals further noted a U.S. State Department Investment Climate Statement that found that the enforcement of Peruvian court rulings is "difficult to predict."<sup>56</sup>

Second, the district court failed to consider whether a Peruvian judgment would be enforceable in California, where Occidental had assets.<sup>57</sup> The Court of Appeals noted that under California's foreign judgment enforcement statute, "California generally enforces foreign [country] judgments, as long as they are issued by impartial tribunals that have afforded the litigants due process."<sup>58</sup> However, "Occidental's own expert [had] provided evidence of corruption and turmoil in the Peruvian judiciary that could become the basis for a challenge to the enforceability of a [Peruvian] judgment."<sup>59</sup>

Thus, the *Carijano* court ultimately concluded that the enforceability factor weighed against dismissal—at least without conditioning the dismissal on an agreement by Occidental "that any Peruvian judgment could be enforced against it in the United States, or anywhere else it held assets, as a condition for dismissal."<sup>60</sup> The Court of Appeals reversed, because "the district court failed to consider all relevant private and public interest factors, entirely overlooking the enforceability of judgments factor, which weighs heavily against dismissal."<sup>61</sup>

51. *Carijano v. Occidental Petroleum Corp.*, 548 F. Supp. 2d 823, 834–35 (C.D. Cal. 2008).

52. *Carijano*, 643 F.3d at 1236.

53. *Id.* at 1231.

54. *Id.*

55. *Id.* at 1232.

56. *Id.* (citing U.S. DEP'T OF STATE, 2010 INVESTMENT CLIMATE STATEMENT—PERU (2010), <http://www.state.gov/e/eb/rls/othr/ics/2010/138128.htm>).

57. *Id.*

58. *Id.* at 1231–32 (citing CAL. CIV. PROC. CODE § 1716(a)–(d) (West Supp. 2015)); *see also* CAL. CIV. PROC. CODE § 1716(b)(1) ("A court of this state shall not recognize a foreign-country judgment if . . . [t]he judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.").

59. *Carijano*, 643 F.3d at 1235; *see also id.* at 1232 ("Occidental's own expert presented compelling evidence of disorder in the Peruvian judiciary.").

60. *Id.* at 1232.

61. *Id.* at 1236.

A second interpretation of the judgment enforceability factor looks at the enforceability of a U.S. judgment abroad if the court denies the motion to dismiss.<sup>62</sup> Often, this second interpretation will make little sense. It certainly makes no sense if the defendant has assets in the United States against which a U.S. judgment could be enforced, because that would render superfluous the question of enforcement abroad.<sup>63</sup> Regardless of the location of assets, concern about the enforceability of a U.S. judgment abroad is a plaintiff's concern, if it is a concern at all. The plaintiff's selection of a U.S. court in a particular case indicates that a U.S. judgment's enforceability abroad is not a concern to the plaintiff in that case—at least not a concern that is significant enough to cause it to avoid a U.S. forum. Perhaps the plaintiff expects to be able to enforce a U.S. judgment against assets of the defendant that are located in a jurisdiction other than the United States or the defendant's preferred alternative jurisdiction. A U.S. court may understandably prefer to avoid an analysis that requires it to understand and perhaps second-guess the strategic litigation choices of the parties. As Martin Davies asks:

If the U.S. court chosen by the plaintiff refuses to dismiss the action, and the plaintiff then wins an unenforceable judgment, what disadvantage can there be to the defendant? Why should the defendant be entitled to dismissal of the U.S. action because of the enforcement difficulties that the *plaintiff* will face after judgment?<sup>64</sup>

### C. CONCLUSORY ANALYSIS

Even courts that properly interpret the judgment enforceability factor sometimes apply it in a conclusory manner. These courts correctly treat the factor as addressing the enforceability of an eventual judgment of the defendant's proposed foreign court (rather than the enforceability of a U.S. judgment abroad).<sup>65</sup> They also take another correct and essential step: they

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62. Davies, *supra* note 13, at 348; *see also* *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1233 (2d Cir. 1996) (finding that the district court's reliance on the unenforceability of a U.S. judgment in Great Britain did not warrant reversal); *Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 1001 (2d Cir. 1993) (finding that any judgment obtained in a U.S. court would "have to be enforced in Australia where all of the Banks' assets are located"); *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 879 (5th Cir. 1987) ("Unlike enforcing a Peruvian judgment in Peru, there would be considerable difficulty in enforcing an American judgment obtained against [the defendant] in the United States."); *Sarandi v. Breu*, No. C 08-2118 SBA., 2009 WL 2871049, at \*7 (N.D. Cal. Sept. 2, 2009) ("[T]he record supports the conclusion that a judgment rendered in this Court may not be enforceable in Switzerland, Austria and Germany, where all but two of the Individual Defendants reside. This fact weighs in favor of Switzerland as the preferable forum." (citations omitted)).

63. *See* *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 375 (5th Cir. 1992) (finding that questions about enforceability of a U.S. judgment abroad do not weigh in favor of dismissal unless the defendant meets its burden of showing it has no U.S. assets).

64. Davies, *supra* note 13, at 350–51.

65. *See supra* Part IV.B.

identify the legal rules that govern the recognition and enforcement of foreign country judgments. However, they typically do not apply those rules to determine whether, under those rules, a judgment of the defendant's proposed foreign court would be enforceable. Instead, these courts tend to equate the mere existence of rules governing the enforcement of foreign country judgments with actual enforceability. This is not only conclusory but also erroneous, because the rules governing foreign country judgments include mandatory and permissive grounds for refusing enforcement. If a mandatory ground applies, a court must refuse enforcement of the judgment; if a permissive ground applies, a court may refuse to enforce the judgment.<sup>66</sup>

For example, a U.S. district court in California correctly interpreted the judgment enforceability factor as requiring consideration of the enforceability of a judgment of the defendant's proposed foreign court (a Bangladeshi court), and correctly identified the applicable state law governing the enforcement of foreign judgments in California. But the court went directly from identifying the rules to stating a conclusion without applying those rules to determine whether a court in California would be required or permitted to refuse enforcement of a Bangladeshi court judgment: "[T]he Court weighs the enforceability of the judgment. Defendants correctly identify the Uniform Foreign Money-Judgments Recognition Act, which gives foreign country judgments enforceability in California. Under this Act, a judgment rendered by a Bangladesh court would be enforceable in California. This factor also supports dismissal."<sup>67</sup>

The problem is that California's rules of foreign country judgment enforcement, like those of all U.S. states, include multiple grounds for refusing enforcement. For example, under section 1716(b)(1) of the California Code of Civil Procedure, a court *must* refuse enforcement if the foreign country judgment "was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements

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66. See Whytock & Robertson, *supra* note 5, at 1465–66.

67. Best Aviation Ltd. v. Chowdry, Nos. 2:12-CV-05852-ODW(VBKx) [18], 2:12-CV-05853-ODW(VBKx) [22], 2012 WL 5457439, at \*6 (C.D. Cal. Nov. 7, 2012) (citing CAL. CIV. PROC. CODE § 1719 (2008)).



of due process of law.”<sup>68</sup> Given the status of the Bangladeshi judicial system,<sup>69</sup> it is possible that this ground for refusal would preclude enforcement. This is a possibility that the judge could have assessed before deciding whether to grant the defendant’s forum non conveniens motion.

These courts properly interpret the judgment enforceability factor, and they take an essential next step by identifying the rules governing the enforcement of foreign country judgments. The problem is that the analysis stops there, with some courts erroneously equating the existence of those rules with enforceability. Instead—as discussed in more detail below—courts will sometimes need to apply relevant portions of the rules of foreign country judgment enforcement to determine the extent to which there are likely to be difficulties enforcing an eventual judgment of the defendant’s proposed foreign court.

The Supreme Court itself is partly responsible for the neglect, inconsistent application, and conclusory analysis of the judgment enforceability factor. For example, the Supreme Court’s widely cited 1981 decision in *Piper Aircraft Co. v. Reyno* did not include judgment enforceability in its list of private interest factors<sup>70</sup>—although the factor is included in both prior<sup>71</sup> and subsequent<sup>72</sup> Supreme Court decisions. Further, the Supreme

68. CAL. CIV. PROC. CODE § 1716(b)(1) (West Supp. 2015); see also *Del Istmo Assurance Corp. v. Platon*, No. 11-61599-CIV, 2011 WL 5508641, at \*6 n.9 (S.D. Fla. Nov. 9, 2011) (“This [judgment enforceability] factor also supports trial of this case in Panama. As Plaintiff points out in its opposition, there is a Florida statute which permits plaintiffs to domesticate and execute foreign judgments. Thus, enforceability of a judgment also weighs in favor of Panama because Florida law explicitly provides a mechanism to enforce a Panamanian judgment against Florida residents.” (citations omitted)); *Loya v. Starwood Hotels & Resorts*, No. Co6-0815 MJP, 2007 WL 1991163, at \*8 (W.D. Wash. July 6, 2007) (“A Mexican judgment against the American defendants would be enforceable in the United States. . . . The recognition of foreign judgments in the United States is governed by state law. Like many states, Washington has adopted the Uniform Foreign Money-Judgments Recognition Act, RCW 6.40 et seq., which provides for enforcement of foreign judgments. Because any judgment against Defendants will be enforceable in Mexico and/or the United States, this factor favors Defendants.” (citations omitted)); *In re Bancredit Cayman Ltd.*, Bankr. No. 06-11026(SMB), Adv. No. 08-1147, 2008 WL 5396618, at \*4 (Bankr. S.D.N.Y. Nov. 25, 2008) (“The plaintiffs also make the related argument, without citation to any authority, that they would face difficulties enforcing a Dominican money judgment in the United States because it is not a ‘sister common law jurisdiction.’ In fact, American courts regularly enforce money judgments obtained in civil law jurisdictions, provided that they are not repugnant to public policy. A judgment based on an unpaid bank loan is not repugnant to our public policy.” (citations omitted)).

69. See, e.g., THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2014, at 173 (2014), [http://worldjusticeproject.org/sites/default/files/files/wjp\\_rule\\_of\\_law\\_index\\_2014\\_report.pdf](http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf) (ranking Bangladesh 92 of 99 nations for rule of law); *Freedom in the World 2014: Bangladesh*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2014/bangladesh-0#.VI37e6ZpjVo> (last visited Dec. 27, 2015) (rating Bangladesh 6 out of 16 on rule of law, and noting politicization, corruption, and severe backlog).

70. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

71. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

72. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994).

Court's decisions provide little guidance to lower courts applying these factors.<sup>73</sup> Thus, lower courts may benefit from a clear framework for applying the judgment enforceability factor in *forum non conveniens* analysis. The next Part provides that framework.

#### V. THE PROPER APPLICATION OF THE ENFORCEABILITY FACTOR

To provide a clear framework for the application of the judgment enforceability factor, this Part draws on the best practices of judges, the law of foreign judgments, and the practical realities of judgment enforcement to provide a simple three-step method for applying the judgment enforceability factor in *forum non conveniens* analysis. The first step is to place the case into one of four basic categories depending on the presence or absence of assets both in the United States and in the defendant's preferred alternative jurisdiction. The second step is to use the information about the location of the defendant's assets determined in the first step to apply one of three presumptions about the judgment enforceability factor. If the court determines that dismissal is otherwise appropriate, the third step is to consider the appropriateness of conditioning the dismissal on the defendant's agreement to satisfy an eventual judgment of the defendant's preferred alternative court.

This three-step method is appropriate when the judgment sought by the plaintiff is a money judgment. As a practical matter, enforcing a money judgment ultimately depends on identifying a jurisdiction where the defendant has assets. The three-step method uses the location of assets as a factual basis for applying a simple presumptive assessment of the judgment enforceability factor. For a non-money judgment, such as a judgment providing injunctive relief, a more complex analysis may be necessary.<sup>74</sup>

The defendant moving to dismiss a suit on *forum non conveniens* grounds has the burden of persuasion, including the burden to persuade the court that the private and public interest factors weigh in favor of dismissal.<sup>75</sup>

73. See *id.* at 448; *Gilbert*, 330 U.S. at 508–09; see also Davies, *supra* note 13, at 348 (“The *Gilbert* court did not articulate what *kind* of ‘enforceability’ question it had in mind. Not surprisingly, different courts have used this sentence as authority for considering rather different features of the cases before them.”).

74. See, e.g., *King.com Ltd. v. 6 Waves LLC*, No. C-13-3977 MMC, 2014 WL 1340574, at \*7–8 (N.D. Cal. Mar. 31, 2014) (noting that at least one U.S. court has enforced a money judgment of a Chinese court, but nevertheless finding in a copyright infringement case that the judgment enforceability factor weighed against dismissal in favor of a Chinese court where there was no evidence that a U.S. court would enforce an injunction issued by a Chinese court).

75. See *SAS Inst., Inc. v. World Programming Ltd.*, 468 F. App'x 264, 265 (4th Cir. 2012) (“The moving party bears the burden not only of showing that an adequate alternate forum exists, . . . but also ‘that the balance of private and public interest factors favors dismissal.’” (citations omitted) (quoting *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011))); *Dole Food Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002) (“A party moving to dismiss based on *forum non conveniens* bears the burden of showing (1) that there is an adequate alternative forum, and (2) that the balance of private and public interest factors favors

Therefore, if the defendant argues that the location of its assets favors dismissal, the defendant would have the burden of producing evidence to establish that location. And if based on the location of the assets, the judgment enforceability factor would presumptively weigh against dismissal, then the defendant would have the burden of demonstrating that the presumption should be overcome.

#### A. LOCATING THE DEFENDANT'S ASSETS

The first step is to place the case into one of four basic categories depending on the presence or absence of assets in the United States and in the defendant's preferred alternative jurisdiction:<sup>76</sup>

1. The defendant has sufficient assets in the United States to satisfy the judgment sought by the plaintiff, but does not have sufficient assets in its preferred alternative jurisdiction;
2. The defendant has sufficient assets in the alternative jurisdiction but not in the United States;
3. The defendant has sufficient assets in both the United States and its preferred alternative jurisdiction; or
4. The defendant has sufficient assets in neither the United States nor its preferred alternative jurisdiction.

The location of the defendant's assets is important because the standard method of enforcing a money judgment is execution, whereby a court issues an order directing an enforcement agent (such as a sheriff) to seize the defendant's assets (now a judgment debtor), sell them, and deliver the proceeds to the plaintiff (now a judgment creditor) in satisfaction of the judgment.<sup>77</sup> Enforceability thus depends on whether a jurisdiction where the defendant has assets will recognize and enforce the judgment and the extent to which the enforcement process there is efficient.

The most direct way to establish the location of the defendant's assets is for the defendant to provide a certification of their location, evidence of their location, or both. If the defendant does not provide sufficient information regarding the location of its assets for the court to categorize the case, then the enforceability factor should weigh against dismissal.<sup>78</sup> While a defendant

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dismissal."); 14D WRIGHT ET AL., *supra* note 8, § 3828.2, at 607 ("Federal courts unanimously conclude that the defendant bears the burden of persuasion on all elements of the forum non conveniens analysis.").

76. In some cases, it may also be helpful to consider the presence of assets in jurisdictions other than the United States and the defendant's preferred alternative jurisdiction. *See infra* notes 103–04 and accompanying text.

77. For a detailed discussion of execution, see JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 15.7 (4th ed. 2005).

78. *See Carijano*, 643 F.3d at 1232 (holding that the judgment enforceability factor weighed against dismissal in part because the defendant's "subsequent withdrawal from [its operations in

may understandably be reluctant to provide information regarding the location of its assets, the need for such information is a result of that defendant's choice to seek dismissal in favor of its preferred foreign court, a choice which it is free not to make. In some cases, the desire not to reveal information about the location of assets may be precisely to make eventual enforcement more difficult, which is a motive that is particularly inappropriate in the context of a doctrine that is concerned with solving potential problems of enforcement.<sup>79</sup> In still other cases, this information may already be public or easily obtainable, in which case a defendant may have no objection to providing it.

### B. THREE PRESUMPTIONS

The second step is to use the information about the location of the defendant's assets determined in the first step to apply one of the following three presumptions about the enforceability factor:

**Presumption 1:** If the defendant has sufficient assets in the United States to satisfy an eventual judgment, but does not have sufficient assets in its preferred alternative jurisdiction, then the judgment enforceability factor weighs against dismissal.

**Presumption 2:** If the defendant has sufficient assets in both the United States and its preferred alternative jurisdiction, or in neither the United States nor its preferred alternative jurisdiction, then the judgment enforceability factor is neutral.

**Presumption 3:** If the defendant has sufficient assets in the alternative jurisdiction but not in the United States, then the judgment enforceability factor weighs in favor of dismissal.

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Peru] raise[d] questions about what assets might be available in Peru to satisfy a judgment there"); *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 375 (5th Cir. 1992) (holding that the district court "unreasonably" weighed the judgment enforceability factor in favor of dismissal because the defendant failed to meet its burden of establishing that it had assets in the foreign jurisdiction); *Kedkad v. Microsoft Corp.*, No. C13-0141 TEH, 2013 WL 5945807, at \*4 (N.D. Cal. Nov. 4, 2013) (finding that the judgment enforceability factor weighed against dismissal and denied defendant's forum non conveniens motion to dismiss a suit in favor of Libya where it was "unclear whether [the defendant] has any assets in Libya that would render it susceptible to judgment from a Libyan court"); *STM Grp., Inc. v. Gilat Satellite Networks Ltd.*, No. SACV 11-0093 DOC (RZx), 2011 WL 2940992, at \*8 (C.D. Cal. July 18, 2011) ("Courts will find the enforceability of the judgment factor to weigh against dismissal if the defendant does not meet its burden of establishing sufficient assets in the foreign jurisdiction to satisfy a judgment.").

79. Short of deciding not to file a motion to dismiss on forum non conveniens grounds at all, a defendant could concede that the judgment enforceability factor weighs against dismissal rather than providing information about its assets. This may understandably raise suspicions, however, about the defendant's willingness to comply with a potential judgment, and if that occurs, the court may be especially reluctant to dismiss. If the court finds that there are legitimate reasons for the location of assets to remain nonpublic, information could be filed under seal and the plaintiff could be asked to agree not to disclose that information except as part of an attempt to enforce an eventual judgment.

These three presumptions are based on a basic insight about enforcement: Enforcement of one jurisdiction's judgment in that same jurisdiction is generally both more likely from a legal perspective and more efficient from a practical perspective. For example, enforcement of a U.S. judgment against assets of the defendant located in the United States will be more likely and more efficient than enforcement of a foreign country judgment against those assets. Legally, this is because there is no general international obligation of countries to recognize or enforce the judgments of each other's courts.<sup>80</sup> Moreover, although many countries will sometimes enforce judgments of foreign courts, domestic rules governing recognition and enforcement of foreign country judgments typically contain legal grounds—sometimes quite broad—that require or permit refusal of enforcement under specified circumstances.<sup>81</sup>

Practically, the difficulty and inefficiency is due to the need for separate enforcement proceedings in the jurisdiction where the assets are located. There is, for example, the possibility of so-called “boomerang litigation,” where there is first litigation of the forum non conveniens motion in a U.S. court, then litigation of the merits in the defendant's preferred alternative court, and then a third round of litigation in a U.S. court over the recognition and enforcement of the alternative court's judgment.<sup>82</sup>

The rationales for these presumptions are as follows.

1. If the Defendant Has Sufficient Assets in the United States to Satisfy an Eventual Judgment, but Does Not Have Sufficient Assets in Its Preferred Alternative Jurisdiction, then the Judgment Enforceability Factor Weighs Against Dismissal

If a U.S. court grants the defendant's motion to dismiss, and the plaintiff refiles the suit in the alternative jurisdiction and obtains a judgment there, the plaintiff will be unable to enforce the judgment there due to the lack of

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80. Under the European Union's (E.U.) Brussels I Regulation (Recast), however, judgments obtained in one E.U. member state will usually be enforced in the territory of other member states. See Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 171 n.134, 175 (2013) (referencing to Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC)). Under the Lugano Convention, this mutual enforcement regime extends to the members of the European Free Trade Association. Zeynalova, *supra*, at 171 n.134, 175 (referencing Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 40).

81. See Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, in 8 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 672, 674–75 (Rüdiger Wolfrum ed., 2012) (“Some countries do not enforce foreign judgments in the absence of a treaty. . . . By contrast, some legal systems recognize foreign judgments more or less to the same degree as domestic judgments. . . . Between these extreme positions, countries have a variety of domestic rules allowing or mandating enforcement under certain conditions . . .”).

82. See Casey & Ristorph, *supra* note 11, at 21–22.

assets. For this reason, “[c]ourts will find the enforceability of the judgment factor to weigh against dismissal if the defendant does not meet its burden of establishing sufficient assets in the foreign jurisdiction to satisfy a judgment.”<sup>83</sup>

The plaintiff can still seek to enforce the judgment against the defendant’s U.S. assets, but this would require “boomerang litigation.”<sup>84</sup> After litigation of the forum non conveniens motion in the United States and then litigation of the merits in the alternative jurisdiction, the suit would return once again to the United States for litigation of recognition and enforcement. This path to enforcement is more difficult and less efficient than simply denying the defendant’s motion to dismiss for forum non conveniens and allowing the merits to be litigated in the United States, where an eventual judgment may be more readily enforced.

Although the primary rationale for the presumption is to avoid the costs, inefficiency, and uncertainty of boomerang litigation, another rationale is that the U.S. rules governing the recognition and enforcement of foreign country judgments may require or permit a U.S. court to refuse enforcement of a judgment of the defendant’s preferred alternative court. When that is the case, if the U.S. court grants the defendant’s motion to dismiss and the plaintiff obtains a judgment in the alternative forum, the plaintiff will be unable to enforce the judgment in the alternative jurisdiction due to the lack of assets there, *and* it may be unable to enforce the judgment in the United States due to the law governing foreign country judgments. The forum non conveniens doctrine would deprive the plaintiff of an opportunity to litigate the merits in a U.S. court, and the law governing foreign country judgments could deprive the plaintiff of a meaningful remedy based on the judgment of the alternative jurisdiction’s court. As explained in Part III, such an outcome raises both justice and efficiency concerns.

To assess the likelihood of such an outcome, it is necessary to go beyond a determination of the location of assets to an analysis of the U.S. rules governing the recognition and enforcement of judgments. Contrary to the practice of some courts, it is conclusory and erroneous to assume that the existence of such rules means that a U.S. court would necessarily enforce a foreign judgment.<sup>85</sup>

These rules are primarily found in U.S. state law. Most states have adopted legislation based on the 1962 Uniform Foreign Money–Judgments Recognition Act (“UFMJRA”),<sup>86</sup> or the 2005 Uniform Foreign–Country

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83. *STM Grp. Inc.*, 2011 WL 2940992, at \*8.

84. *See* Casey & Ristroph, *supra* note 11, at 21–22; *see also supra* note 82 and accompanying text.

85. *See supra* Part IV.C.

86. UNIF. FOREIGN MONEY–JUDGMENTS RECOGNITION ACT, 13 pt. 2 U.L.A. 39 (2002 & Supp. 2015). As of January 31, 2015, 31 states, along with the District of Columbia and the U.S. Virgin Islands, had adopted legislation based on the UFMJRA, including Texas, Delaware, and Florida. *See Legislative Fact Sheet—Foreign Money Judgments Recognition Act*, UNIFORM L. COMMISSION,

Money Judgments Recognition Act (“UFCMJRA”).<sup>87</sup> While the general rule under both Uniform Acts “is that final foreign-country money judgments . . . are . . . entitled to enforcement,”<sup>88</sup> three mandatory grounds for refusal prohibit courts from recognizing a foreign judgment if:

- (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter.<sup>89</sup>

In addition, the UFCMJRA includes six discretionary exceptions that permit courts to refuse the enforcement of a foreign judgment:

- (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; (2) the judgment was obtained by fraud; (3) the [cause of action] . . . on which the judgment is based is repugnant to the public policy of this state; (4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.<sup>90</sup>

The UFCMJRA contains two discretionary exceptions in addition to the six mentioned in the UFCMJRA: “(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or (8) the specific proceeding in the foreign court

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<http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited Dec. 27, 2015).

87. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, 13 pt. 2 U.L.A. 19 (Supp. 2015); *see also* Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. PA. J. INT’L L. 1013, 1025 (2010) (“A majority of states has enacted a highly influential model law, the Uniform Foreign Money-Judgments Recognition Act of 1962 (UFCMJRA) or its 2005 revision, the Uniform Foreign-Country Money Judgments Recognition Act.”). As of December 27, 2015, 20 states, along with the District of Columbia, had adopted legislation based on the UFCMJRA, including California, Iowa, and Hawaii. *See Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited Dec. 27, 2015).

88. Whytock & Robertson, *supra* note 5, at 1465.

89. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(1)–(3), 13 pt. 2 U.L.A. 28 (Supp. 2015); *see also* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1)–(3), 13 pt. 2 U.L.A. 58–59 (2002).

90. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b), 13 pt. 2 U.L.A. 59 (2002).

leading to the judgment was not compatible with the requirements of due process of law.”<sup>91</sup>

In some states, lack of reciprocity is an additional ground for refusal: A court is required or permitted to refuse enforcement if the foreign country would not enforce a U.S. judgment under similar circumstances.<sup>92</sup> Lack of reciprocity is no longer a ground for refusal under federal common law.<sup>93</sup>

Those states that have not adopted legislation based on one of the uniform acts tend to follow the common law approach to the recognition and enforcement of foreign judgments found in the *Restatement (Third) of Foreign Relations Law of the United States*<sup>94</sup> or in the U.S. Supreme Court’s 1895 decision in *Hilton v. Guyot*.<sup>95</sup> As an application of the *Erie* doctrine,<sup>96</sup> federal courts sitting in diversity apply state law to govern the recognition and enforcement of foreign country judgments.<sup>97</sup>

Some of these grounds for refusal cannot be analyzed *ex ante*. For example, a U.S. court cannot determine at the *forum non conveniens* stage

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91. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(7)–(8), 13 pt. 2 U.L.A. 28 (Supp. 2015).

92. Brand, *supra* note 27, at 507.

93. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. d (AM. LAW INST. 1986) (stating that “[a] judgment otherwise entitled to recognition will not be denied recognition or enforcement because courts in the rendering state might not enforce a judgment of a court in the United States if the circumstances were reversed” and even though the reciprocity “holding has not been formally overruled, it is no longer followed in the great majority of State and federal courts in the United States”).

94. See *id.* §§ 481–82. Under § 482:

(1) A court in the United States may not recognize a judgment of the court of a foreign state if: (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in [this Restatement]. (2) A court in the United States need not recognize a judgment of the court of a foreign state if: (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action; (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend; (c) the judgment was obtained by fraud; (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought; (e) the judgment conflicts with another final judgment that is entitled to recognition; or (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

*Id.* § 482.

95. *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895).

96. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

97. See Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 319 (1991) (“Federal courts with diversity jurisdiction have consistently held the issue of recognition and enforcement of foreign country money judgments to be governed by state law.”).



whether “the judgment was obtained by fraud,”<sup>98</sup> whether “the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment,”<sup>99</sup> or whether “the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.”<sup>100</sup> These grounds for refusal can only be analyzed *ex post*—after the completion of the foreign proceedings.

But other grounds for refusal can be analyzed *ex ante* at the *forum non conveniens* stage, thus allowing a U.S. court to deny a motion to dismiss when a judgment of the defendant’s preferred alternative court would not be enforceable in the U.S. jurisdiction where the defendant has assets. Most importantly, the court should analyze whether any mandatory grounds for refusal would preclude enforcement of an eventual judgment of the defendant’s preferred alternative court. For example, if the defendant’s proposed foreign judicial system “does not provide impartial tribunals or procedures compatible with the requirements of due process of law,”<sup>101</sup> or if reciprocity is required and the foreign country would not enforce a U.S. judgment under similar circumstances,<sup>102</sup> then the U.S. court will know *ex ante* that a resulting judgment would be unenforceable both in the United States (due to the rules governing foreign country judgments) and in the defendant’s proposed alternative jurisdiction (due to the lack of assets). In this scenario, the judgment enforceability factor would weigh *strongly* against dismissal.<sup>103</sup>

Some discretionary grounds for refusal can also be analyzed *ex ante*, including the discretionary version of the lack-of-reciprocity ground. Other discretionary grounds, however, are likely to be more directly relevant to the ability of the U.S. court to hear the dispute in the first place or to reasons to deny a motion to dismiss on *forum non conveniens* grounds that would exist regardless of enforceability issues.<sup>104</sup>

98. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(2), 13 pt. 2 U.L.A. 28 (Supp. 2015).

99. *Id.* § 4(c)(7).

100. *Id.* § 4(c)(8).

101. *Id.* § 4(b)(1).

102. *See supra* note 92 and accompanying text.

103. In addition, a court can assess the personal jurisdiction and subject matter jurisdiction grounds for refusal *ex ante*. Typically, defendants consent to jurisdiction in the foreign court, thus addressing concerns about personal jurisdiction. *See* 14D WRIGHT ET AL., *supra* note 8, § 3828.3, at 639 (“Courts often allow a defendant to satisfy the availability requirement by stipulating that it will submit to personal jurisdiction in the alternative forum as a condition for the dismissal on *forum non conveniens* grounds.”).

104. For example, if the cause of action is “repugnant to the public policy of” the forum state, or if there is already a final and conclusive judgment that would conflict with the judgment sought by the plaintiff, the suit would likely be barred in the U.S. court anyway. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3)–(4), 13 pt. 2 U.L.A. 59 (2002). If a “proceeding in the foreign court [would be] contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court,” then the court

An analysis of the potential applicability of grounds for refusal would make the forum non conveniens analysis as a whole more complex. However, this complexity may be avoided by conditioning any dismissal on the agreement of the defendant to satisfy a judgment rendered by the defendant's preferred foreign court, unless the plaintiff's own misconduct gives rise to a ground for refusal—a condition we discuss further below.<sup>105</sup>

To summarize: If the defendant has sufficient assets in the United States to satisfy the judgment sought by the plaintiff, but does not have sufficient assets in its preferred alternative jurisdiction, then the judgment enforceability factor weighs against dismissal. If the court determines that, under the rules governing the recognition and enforcement of foreign country judgments in the state where the defendant's U.S. assets are located, a court would be required or permitted to refuse enforcement of a judgment entered by the defendant's preferred alternative court, then the enforceability factor weighs strongly—if not decisively—against dismissal.

2. If the Defendant Has Sufficient Assets in Both the United States and Its Preferred Alternative Jurisdiction, or in Neither the United States nor Its Preferred Alternative Jurisdiction, then the Judgment Enforceability Factor Is Neutral

If there were sufficient assets in both places, and the motion to dismiss is denied, an eventual U.S. court judgment presumably could be enforced in the United States. If the motion is granted and the plaintiff refiles the suit in the alternative jurisdiction, an eventual judgment in the alternative jurisdiction presumably could be enforced there—although the plaintiff may be able to rebut the presumption of neutrality and show that the judgment enforceability factor instead weighs against dismissal if there is evidence of problems enforcing even the alternative jurisdiction's own judgments there.<sup>106</sup>

If there are insufficient assets in either place, the plaintiff would not be able to enforce a judgment of the alternative jurisdiction's court in the United States or in the alternative jurisdiction. Nor, however, would the plaintiff be able to enforce a U.S. judgment in the United States or in the alternative jurisdiction.<sup>107</sup> In that case, the judgment enforceability factor is neutral.

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can deny the defendant's motion to dismiss on that ground alone. *Id.* § 4(b)(5). And if "the foreign court [is] a seriously inconvenient forum for the trial of the action," then the court should not grant the defendant's motion to dismiss. *Id.* § 4(b)(6).

105. See *infra* Part V.C.

106. See, e.g., *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1232 (9th Cir. 2011) (overruling forum non conveniens dismissal in favor of Peru's courts where a U.S. State Department report indicated that enforcement of Peruvian court rulings is "difficult to predict").

107. In some cases, the factor may weigh against dismissal if a third jurisdiction where the defendant does have assets would be more likely to enforce a U.S. judgment than a judgment of the alternative jurisdiction's courts (for example, due to corruption or lack of rule of law in the alternative jurisdiction). And in some cases, the factor may point in the other direction if the

3. If the Defendant Has Sufficient Assets in the Alternative Jurisdiction but Not in the United States, then the Judgment Enforceability Factor Will Weigh in Favor of Dismissal

If the U.S. court grants the defendant's motion to dismiss, and the plaintiff refiles the suit in the alternative jurisdiction and obtains a judgment, the plaintiff will ordinarily be able to enforce the judgment against the defendant's assets there.<sup>108</sup> If the U.S. court denies the motion, and the plaintiff obtains a U.S. court judgment, the judgment would not be enforceable in the United States due to lack of assets. The plaintiff must then seek enforcement of a U.S. judgment against the defendant's assets in the alternative jurisdiction, but in most cases it would likely be easier for the plaintiff to obtain enforcement there of a judgment of a court in that same jurisdiction than a judgment of a U.S. court.<sup>109</sup>

However, as discussed above, a U.S. court may be legitimately reluctant to weigh this factor in favor of dismissal.<sup>110</sup> Enforcing a U.S. judgment abroad is a plaintiff's concern, if it is a concern at all.<sup>111</sup> The plaintiff's selection of a U.S. court indicates that a U.S. judgment's enforceability in the defendant's preferred alternative jurisdiction is not a concern for the plaintiff—at least not a concern that is significant enough to cause it to avoid a U.S. forum. For example, perhaps the plaintiff believes it would be able to enforce an eventual U.S. judgment against assets of the defendant that are located somewhere other than the United States or the defendant's preferred alternative jurisdiction.

C. CONSIDER CONDITIONING A DISMISSAL

If, based on its assessment of the judgment enforceability factor and other private and public interest factors, a U.S. court decides to grant the defendant's motion to dismiss on forum non conveniens grounds, then the court should consider whether to condition dismissal on the defendant's

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converse is true (for example, if the defendant's proposed foreign jurisdiction is an E.U. member, and the defendant has assets in another E.U. member's jurisdiction, that third jurisdiction where there are assets may be more likely to enforce an E.U. member's judgment than a U.S. court judgment because of the Brussels I Regulation). In most cases, however, the judgment enforceability factor will be neutral in the absence of assets of the defendant in either the United States or the defendant's proposed foreign court.

108. See Davies, *supra* note 13, at 349 ("If the defendant has assets in the alternative foreign forum, there is surely no need to consider whether the foreign court's judgment could be enforced in the United States. The foreign judgment can obviously be enforced against the defendant's assets in the foreign country, regardless of whether the defendant also has assets in the United States."). As noted below, this may overstate the certainty of enforceability in the foreign jurisdiction. See *infra* note 109 and accompanying text.

109. In some cases, if enforcement in the alternative jurisdiction would be difficult regardless of the presence of assets there, this factor would be neutral or, at most, weakly favor dismissal.

110. See *supra* text accompanying notes 62–64.

111. See *supra* note 64 and accompanying text.

agreement to satisfy a judgment that may be entered by the defendant's preferred alternative court. Courts frequently impose this type of condition.<sup>112</sup> This condition is not, however, a substitute for analyzing and applying the judgment enforceability factor. If a defendant fails to fulfill the condition by later refusing to satisfy a final judgment, a U.S. court will have to determine the repercussions. Since the court dismissed the case on the condition that the defendant would satisfy a final judgment in the forum, the U.S. court may decide to hear the case in the United States. In this situation, a case would have to be relitigated, and would have taken up more judicial resources than if the U.S. court had decided to hear the case in the first place.

Additionally, courts frequently impose a version of this condition that, if taken literally, may be too broad, requiring satisfaction of "any" judgment that the foreign court may enter.<sup>113</sup> This condition would leave the defendant unprotected against judgments that are a result of the plaintiff's own misconduct, such as fraud or bribing a judge. With this type of condition, a plaintiff may have an incentive to seek a favorable judgment in any way possible, including fraud and deception, since a defendant would be barred from fighting enforcement in the United States.

On the other hand, a condition that the defendant agrees to satisfy a judgment unless there is an applicable ground for refusing enforcement under the U.S. law of foreign country judgments would help protect the defendant against judgments obtained by the plaintiff's fraud, but it does nothing to reduce the likelihood of post-judgment "boomerang litigation" in

112. See, e.g., *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1551 (5th Cir. 1991); *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 105 (6th Cir. 1989); *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1059 (8th Cir. 1986); *Cheng v. Boeing Co.*, 708 F.2d 1406, 1409 (9th Cir. 1983); *Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 719 (8th Cir. 1981); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842, 852 (S.D.N.Y. 1986).

113. See, e.g., *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1349 (1st Cir. 1992) ("The second district court dismissal order was conditioned on . . . Sheraton's agreement to satisfy any Turkish court judgment."); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 731 (5th Cir. 1990) (granting motion to dismiss on a conditional basis, including on the condition that the defendant "[f]ormally agree in the Philippine proceeding to satisfy any final judgment rendered by such court"); *Mizokami Bros. of Ariz., Inc.*, 660 F.2d at 719 ("Because appellant has raised a serious question of the availability of a Mexican forum, the better procedure would be to dismiss the action subject to the following conditions: . . . Mobay agrees to satisfy any judgment awarded in the Mexican courts."); *In re Herbert*, Nos. 13-00452 DKW-BMK, 13-00705 DKW-BMK, 2014 WL 1464837, at \*11 (D. Haw. Apr. 14, 2014) ("The Court hereby conditions its *forum non conveniens* dismissal on Defendants' agreement to . . . allow for the enforcement of any Indonesian judgment in the United States or anywhere else where Defendants hold assets."); see also *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1235 (9th Cir. 2011) ("When there is reason to think that enforcing a judgment in a foreign country would be problematic, courts have required assurances that a defendant will satisfy any judgment as a condition to a *forum non conveniens* dismissal."); *Davies*, *supra* note 13, at 349-50 ("If the defendant has assets in the United States but none abroad, the court may still dismiss on *forum non conveniens* grounds if the other factors warrant it, but should then make the dismissal conditional on an undertaking by the defendant to satisfy any judgment given against it by the foreign forum.").

the United States or to prevent forum non conveniens dismissals when it is possible to determine ex ante that a judgment of the defendant's preferred foreign court would likely be unenforceable in the United States.

The type of condition that should be considered by courts inclined to grant a forum non conveniens dismissal should require the defendant to satisfy a judgment of the defendant's preferred alternative court unless there is a ground for refusal that applies because of the plaintiff's own misconduct. For example, a court could force a defendant to fulfill a judgment even where the defendant has complaints about the general legal process in the foreign forum, but refuse to force a defendant to satisfy a judgment resulting from the plaintiff's bribery of the judge. This type of condition would not only prevent defendants from arguing for an alternative court for the sole purpose of later challenging enforcement of a judgment from that court, but also prevent plaintiffs from taking advantage of a defendant's agreement to fulfill any judgment awarded in the foreign forum.

#### D. APPLICATIONS

To illustrate how our method works, we use three examples: *Piper Aircraft Co. v. Reyno*,<sup>114</sup> *Carijano v. Occidental Petroleum Corp.*,<sup>115</sup> and *Gonzalez v. Naviera Neptuno A.A.*<sup>116</sup>

##### 1. *Piper Aircraft Co. v. Reyno*

First, we apply our proposed framework to the facts in *Piper*. The claims in *Piper* arose out of a plane crash in the Scottish Highlands that killed a pilot and five passengers.<sup>117</sup> The representatives of the decedents' estates initially filed suit against the U.S.-based plane and propeller manufacturers in a California state court.<sup>118</sup> The defendants then successfully removed the case to federal court and had it transferred to a district court in Pennsylvania.<sup>119</sup> After the transfer, the defendants claimed that Scotland was a more appropriate forum for adjudicating the dispute, and moved for dismissal on forum non conveniens grounds.<sup>120</sup>

In applying our proposed framework to determine whether the enforceability factor weighs in favor or against dismissal, the first step is to locate the defendants' assets.<sup>121</sup> While the Court in *Piper* never specifically stated the location of the defendants' assets, the defendants were U.S. corporations that manufactured the aircraft and propellers in Pennsylvania

114. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

115. *Carijano*, 643 F.3d at 1216.

116. *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987).

117. *Piper*, 454 U.S. at 239.

118. *Id.* at 239-40.

119. *Id.* at 240-41.

120. *Id.* at 241-42.

121. *See supra* Part V.A.

and Ohio.<sup>122</sup> Because of their location and operations in the United States, it is likely that if the defendants had sufficient assets anywhere to satisfy a final judgment, it would have been in the United States (for example, in Pennsylvania and Ohio). The *Piper* Court did not indicate the size or even existence of the defendants' operations in Scotland. According to the district court, the aircraft "was sold and delivered to a purchaser in Ohio for use in the United States," and defendants were unaware that a Scottish air-taxi company subsequently acquired the aircraft for use outside of the United States.<sup>123</sup> These facts support the argument that the defendants did not have operations in Scotland, and thus, probably lacked sufficient assets in the forum to satisfy a final judgment, and we will assume that is the case for illustrative purposes.

The second step in our proposed framework is to use the information about the location of the defendants' assets to apply one of three presumptions.<sup>124</sup> Since the defendants have sufficient assets in the United States but probably not in Scotland, the first presumption applies and the judgment enforceability factor should weigh against dismissal. Furthermore, if U.S. law—in particular, the law of Ohio or Pennsylvania, where the defendants presumably have assets—would prevent the enforcement of a Scottish judgment in the United States (for example, because of lack of reciprocity), the enforceability factor should weigh strongly against dismissal.

Even if the enforceability factor in this case weighs against dismissal, the court could still decide to dismiss the case based on countervailing private and public interest factors. In this situation, the court should only dismiss on the condition that the defendant agree to satisfy a judgment of the defendant's preferred alternative court unless there is a ground for refusal arising from the plaintiff's own misconduct.<sup>125</sup>

## 2. *Carijano v. Occidental Petroleum Corp.*

Next, we apply our proposed framework to the facts in *Carijano v. Occidental Petroleum Corp.*, which we discussed in detail in Part IV.B. The defendant in *Carijano* was a U.S. corporation with operations in Peru.<sup>126</sup> The plaintiffs claimed that Occidental's Peruvian operations caused them physical harm and damaged their land.<sup>127</sup> After removing the case to federal court, Occidental moved for dismissal on forum non conveniens grounds.<sup>128</sup>

122. *Piper*, 454 U.S. at 239.

123. *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 729 (M.D. Pa. 1979).

124. *See supra* Part V.B.

125. *See supra* Part V.C.

126. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1222 (9th Cir. 2011).

127. *Id.* at 1222–23.

128. *Id.* at 1223.

Again, the first step is to look at the location of the defendant's assets.<sup>129</sup> Occidental is a U.S. corporation and will likely have sufficient assets in the United States to fulfill a final judgment. The *Carijano* court stated that "Occidental's subsequent withdrawal from [its operations from Peru] raise[d] questions about what assets might be available in Peru to satisfy a judgment there."<sup>130</sup> Moreover, under our proposed framework, the defendant has the burden to show that it has sufficient assets in the foreign jurisdiction to satisfy a final judgment.<sup>131</sup> Occidental did not meet this burden, so this case falls under the category of the defendant having sufficient assets in the United States but not in the proposed foreign jurisdiction.

The second step, then, is to apply one of three presumptions based on the location of the defendant's assets.<sup>132</sup> Since the defendant has assets in the United States, but does not have sufficient assets in the foreign forum, the first presumption applies. Under the first presumption, the judgment enforceability factor should weigh against dismissal. The *Carijano* court also determined that California state law would potentially prevent the plaintiffs from enforcing a Peruvian judgment in the United States.<sup>133</sup> Therefore, because the plaintiffs might not be able to enforce a Peruvian judgment against Occidental in the United States—the only place it has assets—the enforceability factor should weigh strongly against dismissal, and the court may even decide to reject dismissal on this fact alone. Even still, the court may decide to dismiss the case if other factors weigh in favor of dismissal as long as the court conditions the dismissal on the defendant agreeing to fulfill a Peruvian judgment unless there is a ground for refusal that applies because of the plaintiff's own misconduct.<sup>134</sup>

Our proposed framework has a similar component in determining the weight the judgment enforceability factor should have in relation to the rest of the private and public interest factors, but the simple determination that the factor should weigh against dismissal depends primarily on the location of the defendant's assets. This method should provide courts with a simple, straightforward framework that could ultimately lead to a consistent and uniform approach to the enforceability factor.

### 3. *Gonzalez v. Naviera Neptuno A.A.*

Finally, we apply our framework to the facts in *Gonzalez v. Naviera Neptuno A.A.*<sup>135</sup> The plaintiff in *Gonzalez* sued a Peruvian shipping corporation in a U.S.

<sup>129.</sup> See *supra* Part V.A.

<sup>130.</sup> *Carijano*, 643 F.3d at 1232.

<sup>131.</sup> See *id.* (citing *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 375 (5th Cir. 1992)).

<sup>132.</sup> See *supra* Part V.B.

<sup>133.</sup> *Carijano*, 643 F.3d at 1232–33.

<sup>134.</sup> See *supra* Part V.C.

<sup>135.</sup> *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987).

court after her son was killed in Port Arthur, Texas while working aboard one of the defendant's ships.<sup>136</sup> None of the owners of the defendant corporation were residents of the United States, and the only operations in the United States consisted of its vessels making calls at U.S. ports while carrying cargo to and from the United States.<sup>137</sup>

The first step is to determine the location of the defendant's assets.<sup>138</sup> In contrast to *Piper* and *Carijano*, where the defendants had sufficient assets in the United States, the *Gonzalez* court found that the defendant had "no corporate offices, bank accounts or permanent employees stationed in the United States."<sup>139</sup> The defendant did not appear to have sufficient assets in the United States to satisfy a U.S. judgment. On the other hand, the defendant was a Peruvian shipping company, its president was a citizen and resident of Peru, and its "vessels beg[an] and end[ed] their voyages in Peru."<sup>140</sup> Under these facts, it appears that the defendant does not have sufficient assets in the United States to fulfill a final judgment, but it does have sufficient assets in Peru—the alternative forum.

Next, we use the location of the defendant's assets to apply one of three presumptions.<sup>141</sup> Since the defendant has sufficient assets in the alternative forum, but not in the United States, the third presumption applies and the judgment enforceability factor should weigh in favor of dismissal. This presumption may be rebuttable, however, if the plaintiff can show there would be difficulty enforcing a Peruvian judgment in Peru regardless of the defendant's assets there. If the plaintiff meets that burden and the court determines there are serious judgment enforceability concerns in both the United States and Peru, the factor should be neutral.

## VI. CONCLUSION

The forum non conveniens doctrine is an important tool for determining whether a case should be adjudicated in the United States. When applied correctly, the doctrine promotes the principles of justice and efficiency. However, many courts have neglected or inconsistently applied the judgment enforceability factor in forum non conveniens analysis. This neglect and inconsistent application of the judgment enforceability factor can negatively impact a plaintiff's access to justice and judicial efficiency.

Our proposed framework attempts to solve the inconsistent interpretation and application of the judgment enforceability factor by providing a straightforward test that can be applied in all cases in which a

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<sup>136.</sup> *Id.* at 877.

<sup>137.</sup> *Id.*

<sup>138.</sup> *See supra* Part V.A.

<sup>139.</sup> *Gonzalez*, 832 F.2d at 879.

<sup>140.</sup> *Id.* at 877.

<sup>141.</sup> *See supra* Part V.B.



party files a forum non conveniens motion, not just those where the relevance of the judgment enforceability factor is immediately apparent. By looking at the location of the defendant's assets and then applying one of three presumptions, courts can quickly determine whether the factor weighs in favor of or against dismissal, or is simply neutral.

While our framework provides a simple, categorical method for application of the enforceability factor, it also allows judges to use their discretion to determine whether a party has satisfied its burden to rebut the presumptions. Application of this framework in forum non conveniens cases will ensure that judges continue to have latitude when applying the forum non conveniens doctrine, while mitigating the fairness and judicial efficiency problems that can arise when the judgment enforceability factor is neglected.